

February 7, 2011

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David A. Stawick
Secretary of the Commission
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, N.W.
Washington, D.C. 20581

**Re: Real-Time Public Reporting of Swap Transaction Data
(RIN No. 3038-AD08)**

Dear Mr. Stawick:

The coalition of energy end-users¹ ("Coalition") hereby submits these comments in response to the Notice of Proposed Rulemaking ("NOPR")² issued by the Commodity Futures Trading Commission (the "CFTC" or the "Commission"), in which the Commission requested comments on its proposal to require real-time public reporting of swap transaction data to implement Section 727 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act").³ The Coalition supports the goal of bringing greater transparency to the swaps markets. The Coalition believes, however, that imposing an onerous real-time reporting obligation on end-users for their swaps transactions with each other provides no incremental value with respect to the goal of transparency in the swaps markets. The Coalition also recommends that the Commission institute a standards development process to create a data and reporting standard for use by all parties responsible for real-time reporting.

¹ The coalition includes the Edison Electric Institute, Electric Power Supply Association, American Gas Association and Natural Gas Supply Association (together, the "Coalition," separately, the "Associations"). The Associations' members include power generators and shareholder-owned electric utilities and natural gas utilities, suppliers and producers that use energy and energy-related "swaps" to manage the commercial risks inherent in their core energy business activities. The comments contained in this filing represent the initial position of the Coalition, but not necessarily the views of any particular member with respect to any issue. The Coalition or its members may submit additional comments in response to the Commission's proposed rules.

² 75 Fed. Reg. 76,139 (Dec. 7, 2010); errata 75 Fed. Reg. 76,930 (Dec. 10, 2010).

³ Public Law 111-203, 124 Stat. 1376 (2010).

I. The Dodd-Frank Act Does Not Require Real-Time Reporting Of All Swaps

A. The Dodd-Frank Act Does Not Require The CFTC To Mandate Real-Time Reporting Of Non-Standard, Customized Swaps

Section 727 of the Dodd-Frank Act directs the Commission to promulgate rules for the public availability of data related to certain swap transactions. Section 2(a)(13)(C) authorizes the Commission to require real-time public reporting of swaps that are:

- (i) *subject to the mandatory clearing* requirement described in (h)(1) (including those swaps that are excepted from the requirement pursuant to subsection (h)(7));
- (ii) not subject to the mandatory clearing requirement described in subsection (h)(1), *but are cleared* at a registered derivatives clearing organization;
- (iii) not cleared at a registered derivatives clearing organization and which are reported to a swap data repository or the Commission *under subsection (h)(6)*; and
- (iv) determined to be *required to be cleared* under subsection (h)(2) but are not cleared.⁴

In its NOPR, the Commission states that these four swap categories "cover all swaps and, therefore, the real-time reporting requirements apply to all swaps."⁵ The categories described in Section 2(a)(13)(C)(i),(ii) and (iv), however, only cover new swaps that are actually cleared or are required to be cleared.⁶ Consequently, Congress has only authorized the Commission to impose real-time reporting requirements on new swaps that meet the criterion listed above. Notably, only standard swaps can satisfy the criterion for mandatory clearing in Section 723(a)(3) of the Dodd-Frank Act, which requires a demonstration of "[t]he existence of significant outstanding notional exposures, trading liquidity and adequate pricing data."⁷ The categories do not include new customized swaps, which are swaps designed by the parties to satisfy particular and unique business purposes. Accordingly, such customized swaps need not be

⁴ See 7 U.S.C. § 2(a)(13)(C) (*emphasis added*); see also NOPR at 76,141.

⁵ NOPR at 76,141.

⁶ Section 2(a)(13)(C)(iii) applies to uncleared swaps covered by the clearing transition provisions in Section 2(h)(6), which are swaps (1) entered into before the date of enactment of (h)(6) and reported to an SDR and (2) entered into before application of the clearing requirement and reported to an SDR. The Commission should not impose real-time reporting obligations on end-user swaps executed prior to (h)(6) enactment or implementation of the clearing requirement. By their nature, previously-executed swaps cannot contribute to price discovery, so imposing a real-time reporting obligation on end-users for such swaps would not serve the statutory purpose underlying Section 727 of the Dodd-Frank Act.

⁷ 7 U.S.C. § 2(h)(2)(D).

reported in real-time. They are neither cleared nor within the scope of the kinds of swaps that the statute makes subject to mandatory clearing.⁸

This legal conclusion makes perfect sense given the purpose of the real-time reporting obligation, which, as is stated plainly in the statute, is to "enhance price discovery."⁹ Real-time reporting of swaps that do not trade widely, because they have unique characteristics that are difficult to value, would add nothing to price transparency and would provide no useful information to the markets regarding the value of the swaps' underlying commodity.

B. Standard End-User To End-User Swap Transactions Should Not Be Subject To Real-Time Reporting

The Coalition observes that as a regulatory agency with the responsibility to implement a statute that, for the most part, contains broad mandates to ensure the satisfaction of broad policy purposes, the Commission has discretion to interpret the statute in a manner that serves those purposes.¹⁰ To this end and in this context, the Commission may strike a sensible balance between the costs of real-time reporting and its value. For end-users who enter into swaps, that balance clearly argues in favor of exempting

⁸ Concerns over anonymity provide another reason why bespoke swaps are not reportable in real-time. Congress required that real-time public reporting be done "in a manner that does not disclose the business transactions and market positions of any person." See Section 2(a)(13). In an attempt to meet this requirement, the Commission proposes § 43.4(e)(1), which would prohibit the disclosure of swap transaction and pricing data that is publicly disseminated in real-time and that identifies or otherwise facilitates the identification of a party to a swap. 75 Fed. Reg. 76,150. Because of a bespoke swap's inherently unique terms, counterparty identities or positions are highly likely to be identifiable if such non-standardized swap terms are publicly reported. Thus, Congress excluded non-standardized swaps from the real-time reporting requirement. Safeguards, such as those proposed by the Commission (e.g., limiting tenor disclosure to the month and year the swap expires, using a broader geographic region to describe the swap), should apply to standardized swaps that are subject to the real-time reporting requirement. In addition, the Commission should limit the number of fields that must be reported when reporting certain fields would raise confidentiality concerns, when the reporting party does not capture the data at all or at the level of granularity contemplated by the proposed rules, or when the field is not applicable or material for the particular swap.

⁹ 7 U.S.C. § 2(a)(13).

¹⁰ See, e.g., *Chevron, U.S.A., Inc. v. Nat. Resources Def. Council, Inc.*, 467 U.S. 837, 844 (1984) ("Considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations "has been consistently followed . . . whenever decision as to the meaning or reach of a statute has involved reconciling conflicting policies, and a full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations.") (quoting *United States v. Shimer*, 367 U.S. 374, 382 (1961) (internal citations omitted)); *Alabama Power Co. v. Costle*, 636 F.2d 323, 360-61 (D.C. Cir. 1969) ("Categorical exemptions may also be permissible as an exercise of agency power, inherent in most statutory schemes, to overlook circumstances that in context may fairly be considered de minimis. It is commonplace, of course, that the law does not concern itself with trifling matters, and this principle has often found application in the administrative context. Courts should be reluctant to apply the literal terms of a statute to mandate pointless expenditures of effort.").

them from real-time reporting of standard swaps that are executed with each other and not on a swap execution facility ("SEF") or designated contract market ("DCM") ("Off-Facility End-User Swaps").

Even sophisticated end-users that enter into many standard swaps for hedging purposes do not have the technology and systems capability approaching that of traditional swap dealers (e.g., financial entities). Swap dealers have books of business that typically are much larger because they encompass a much broader universe of types of swaps and because it is the core of their regular business. Accordingly, of necessity, swap dealers have and will continue to develop sophisticated and highly complex computer systems powered by highly customized software to enable them to keep track of and manage their books of business. End-users simply do not have these systems and capabilities. In fact, many keep track of swaps using simple spreadsheets, and even the most sophisticated of such end-users capture their swaps in relatively inflexible, often off-the-shelf software products for trade capture that have very limited flexibility for customization. Accordingly, the costs that end-users would incur to purchase, develop, and maintain the systems that would be required for real-time reporting would be substantial.

These costs are not justified by any value associated with the purpose of real-time reporting, which the statute makes explicit – real-time reporting is to "enhance price discovery."¹¹ Without substantial investments in computers, software, and supporting infrastructure, the best that end-users are likely to be able to manage is reporting by the close of business one business day after transaction formation.¹² Accordingly, there would be no value at all, with respect to price discovery in real-time, of any of the data reported. The day for which the data would be relevant would have passed.

Arguably, even if end-users could provide data on Off-Facility End-User Swaps inside the day on the same schedule as swap dealers, the incremental value of the information would still be essentially nil. The volume of these transactions will be a small fraction of the volume of the same swaps to be reported by swap dealers, and therefore there is no chance that any published indices reported in real-time and compiled with any real-time data received for Off-Facility End-User Swaps would be different than they would be otherwise. In fact, the data, if disseminated after-the-fact, could cause confusion, as it will not be representative of current market data when it is made public.

In sum, it is appropriate for the Commission to acknowledge the enormous burden and the absence of any benefit from imposing a real-time reporting requirement on end-users for Off-Facility End-User Swaps. The Commission should, therefore, expressly

¹¹ 7 U.S.C. § 2(a)(13).

¹² The Commission has recognized that non-electronically verified swaps (such as end-user to end-user swaps) will require "a significant amount of manual intervention" for reporting and that a 24-hour reporting period is reasonable. See *Swap Data Recordkeeping and Reporting Requirements*, 75 Fed. Reg. 76,574 at 76,583 (Dec. 8, 2010).

provide in its regulations implementing Section 727 that there will be no such real-time reporting requirement.

II. The Proposed Reporting Requirements Are Unduly Burdensome And Costly For End-Users

A. If The Commission Imposes A Real-Time Reporting Obligation On End-Users For Off-Facility End-User Swaps, The Reporting Process Should be Modified

If the Commission insists on the real-time reporting of Off-Facility End-User Swaps, given the substantial costs faced by end-users, it should provide affected parties a number of options including the option to utilize a direct feed or a user-friendly, web-based template to facilitate such reporting. In addition, the template should require reporting of only the core commercial terms, as applicable to the swap, that end-users typically record in their spreadsheets or trade capture systems, namely:

- Product (fixed-for-floating, float-for-floating, swaptions on both);
- Fixed price;
- Underlying product and index/pricing point (two products if it is float-for-float);
- Tenor (including hours, *e.g.*, on-peak/off peak);
- Notional quantity; and
- Counterparty (with the appropriate confidentiality restrictions against publishing counterparty identity).¹³

The Coalition suggests that this is the only way to alleviate the cost and burden of such real-time reporting, should the Commission disagree with the Coalition's contention that

¹³ As used in the above list, floating means the variable price that one party pays (*e.g.*, the PJM West Hub price that PJM publishes). It is an index because it is a weighted average of many PJM LMP nodes. Each node is a pricing point. A swap will either use an index or a single pricing point. For example, someone might pay a fixed price in exchange for the other's promise to pay the price at the other party's generator node. That generator node is a pricing point. Continuing with the PJM example, the underlying product is physical power. Tenor means term, and sometimes sub-elements within the term. For example, if the swap is for July/Aug, and it is physical power, it likely would be ATC (around-the-clock), on-peak (the 16 peak hours on each weekday), or the "wrap" which means all hours other than the on-peak hours (*i.e.*, all off-peak hours). The swap math in the latter two cases is only done for the specified hours. Notional quantity is the amount swapped in each hour (*e.g.*, 25 or 50 MW are standard amounts for many power swaps). Note also that the notional quantity can itself be a variable quantity. For example, a "load-following" swap could be for the amount of actual load of a wholesale customer in each hour. A load-serving entity might be able to get a dealer to accept a fixed price in exchange for the dealer's promise to pay the price (which will typically be an index, usually a zonal price) that the load has to pay for all of its load as it changes in every hour.

no real-time reporting of Off-Facility End-User Swaps is either required by the statute or consistent with its intended purpose.¹⁴

The Commission also should not require end-users to report inter-affiliate swap transactions. Such transactions are most commonly used to make transfers and shift risks within a larger corporate family and do not necessarily mirror market conditions for arms-length transactions. Thus, inter-affiliate swaps should not be used as an input to published real-time swap data as they do not serve to enhance price discovery.

B. The Commission Should Institute A Process To Develop A Data Reporting Standard Applicable To All Entities The Commission Ultimately Requires To Report

The Coalition recommends that the Commission establish a standard-setting process that can effectively result in cost-effective, efficient real-time reporting. The Coalition is familiar with several American National Standards Institute ("ANSI") based processes used by the Federal Energy Regulatory Commission ("FERC") and other agencies in which affected stakeholders and technical experts come together under the agency's umbrella to satisfy a regulatory mandate. Through these processes, numerous regulatory requirements involving technical standards have been implemented.¹⁵

Although the Coalition does not believe that the CFTC must follow any particular existing process, a comparable coordinated process should be adopted if the Commission believes it must require reporting of Off-Facility End-User Swaps in real-time. This will help ensure development of the user-friendly reporting technology described above.

C. Comments On Other Parts Of The Proposed Rule

1. Responsibilities Of The Reporting Party To Report Data

The Commission requests comment on its proposal on who must act as the reporting party in certain swap transaction scenarios set forth in proposed rule § 43.3.¹⁶ The Coalition agrees that swap transactions completed on a swap market should be treated

¹⁴ The Coalition suggests that this proposal is the kind of approach contemplated by President Obama, in Executive Order 13563, directing agencies to take steps to ensure that the costs of regulations are commensurate with their benefits. 76 Fed. Reg. 3821 (Jan. 21, 2011); see also the Paperwork Reduction Act, which directs federal agencies to reduce information collection burdens on the public. 44 U.S.C. § 3506(b)(1)(A).

¹⁵ See, for example, *Standards for Business Practices and Communication Protocols for Public Utilities*, Order No. 676, FERC Stats. & Regs. ¶ 31,216, n.5 (2006), *reh'g denied*, Order No. 676-A, 116 FERC ¶ 61,255 (2006). Real-time reporting raises a variety of practical concerns. The Coalition members welcome any opportunity to work with Commission staff to better define the data fields or to address reporting technology.

¹⁶ NOPR at 76,145-46.

as reported for purposes of compliance with new Part 43.¹⁷ The Coalition also agrees with the Commission's proposal to designate swap dealers as the reporting party in any reportable transaction involving only one swap dealer, major swap participants as the reporting party in transactions involving one major swap participant and no swap dealers, and a reporting party selected by agreement between the parties in all other instances where a derivatives clearing organization ("DCO") is not involved.¹⁸ If an Off-Facility End-User Swap is cleared, the DCO should be the reporting party.¹⁹

2. Appendix A To Proposed Part 43

The Coalition observes that the Commission has identified four broad categories of contract types that may be entered into for which real-time reporting will be required: swaps, swaptions, forwards and stand-alone options.²⁰ The Coalition notes that the Commission has yet to issue a proposed rule that defines swap. Although it is not entirely clear from the language, the Coalition contends that at least two of these categories do not include swaps that the Commission has the authority to regulate – forward transactions, and stand-alone options, assuming the latter refers to options to buy or sell physical commodities. The Coalition will wait until the Commission issues proposed rules on the definition of swap to explain further its views on this critical issue.

3. Obligations Absent A Registered Swap Data Repository

The Commission suggests that if no registered Swap Data Repository ("SDR") is available to accept and publicly disseminate swap transaction and pricing data, the reporting party should report such data to a third-party public disseminator. The reporting party would remain legally responsible for public dissemination of the information. This proposal places reporting parties in an impossible position. The Commission does not describe how reporting parties should determine whether such third-party disseminators exist, how their performance can be guaranteed, and what steps should be taken if third-party disseminators also will not accept a transaction. Moreover, it is not clear why an entity other than an SDR would accept a transaction when SDRs will not. Thus, the Coalition is concerned that the concept of third-party disseminators is flawed and should be abandoned unless the Commission brings more clarity and structure to that role, including by: (1) requiring disseminators to register

¹⁷ See NOPR at 76,145.

¹⁸ See NOPR at 76,146. This assumes that the reporting party has not qualified for a 2(h) exemption.

¹⁹ A large majority of such swaps are cleared nearly simultaneously with execution, so concerns about DCO reporting delays are unwarranted.

²⁰ NOPR at 76,154.

with the Commission; (2) establishing performance guidelines; and (3) better delineating the compliance obligations of the reporting counterparty and the disseminator.²¹

The Commission also asks what the real-time reporting obligation should be if there is no registered SDR or third-party service provider available to accept and publicly disseminate data for a swap transaction.²² The Coalition believes that the Commission should not require end-users to report swap transactions for real-time reporting purposes unless and until there is an entity that will publicly disseminate the reported data. To require otherwise would subject parties to the expense of reporting data that will not contribute to transparency in any way.

III. Conclusion

The Coalition members respectfully urge the Commission to adopt real-time reporting rules that are consistent with these comments and avoid imposing real-time reporting obligations for off-facility end-user to end-user swap transactions.

Respectfully submitted,



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²¹ The Commission can minimize the number of transactions that will not be accepted by SDRs by excluding customized transactions and inter-affiliate transactions from its real-time reporting requirements. In the event that such transactions are subject to real-time reporting, the relevant information should be reported directly to the Commission.

²² See NOPR at 76,146.